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IN THE
SUPREME COURT OF THE
UNITED STATES

1972 TERM

NO. MISC.

HARRY L. LONQUEST,

Petitioner,

vs.

THE STATE OF WYOMING
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WYOMING

TO: THE HONORABLE, THE CHIEF
JUSTICE, AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE
UNITED STATES

The Petitioner, Harry L. Lonquest, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Wyoming rendered March 23, 1972, affirming a judgment rendered by the District Court, First Judicial District, Laramie County, Wyoming, convicting the petitioner of murder in the first degree and sentencing him to life imprisonment in the Wyoming State Penitentiary.

OPINION BELOW

The opinion of the Supreme Court of Wyoming affirming petitioner's conviction is unofficially reported at 495 P2d 575 and a copy of the same is annexed hereto as Appendix A. The opinion of the Supreme Court of Wyoming, denying the petitioner's Petition for Rehearing is not at this time reported, however, a copy of the Wyoming Supreme Court's opinion denying petitioner's Petition for Rehearing is annexed as Appendix C. There is no official reporter for the State of Wyoming.

JURISDICTION

The judgment of the Supreme Court of Wyoming affirming the petitioner's conviction of murder in the first degree was entered on March 23, 1972. A timely Petition for Rehearing (hereto annexed as Appendix B) was denied by the Wyoming Supreme Court on May 9, 1972, and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

Whether the trial court erred in overruling the petitioner's objection to the admission of his alleged confession in violation of petitioner's constitutional rights under the 5th, 6th and 14th Amendments to the United States Constitution where petitioner was an elderly, inebriated, mentally ill alcoholic who was strapped to his hospital bed at the time the alleged con-

fession was extracted and who had, prior to the time the confession was extracted, requested the presence of his attorney at the hospital.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of live, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 10, 1970, Thelma Lonquest, wife of the petitioner, died of a gunshot wound in the couple's ranch home, fifteen miles northeast of Wheatland, Wyoming. The deceased and the petitioner were elderly alcoholics. The petitioner's medical history indicates considerable evidence of mental illness over an extended period of time. Six weeks prior to Mrs. Lonquest's death, the petitioner was treated psychiatrically at Beth Israel Hospital in Denver, Colorado. The petitioner was in very poor physical and mental condition. The Beth Israel psychiatrist reached a psychotic diagnosis of delirium tremens, including gross confusion, hallucinations, fearfulness, motor restlessness and tremulousness. The petitioner was released from the hospital a week prior to his wife's death. His prognosis was poor.

Sheriff Einer Mickelsen, responding to a telephoned report of a shooting at the Lonquest ranch, about noon on July 10, 1970, discovered the petitioner propped in a doorway of the ranch home in "real bad shape". The petitioner was talking to himself and was, according to the Sheriff, "pretty much helpless". The petitioner was unable to walk and the Sheriff helped him to his bed. Shortly thereafter he fell out of his bed. Petitioner continued to mumble incoherently and was unable to move himself. The Sheriff read a small card with the "Miranda" warnings to the petitioner. The Sheriff determined that he could not properly take care of petitioner in the county jail and thereafter petitioner was loaded onto a stretcher and taken in an ambulance to the Platte County Memorial Hospital by the County Coroner and his assistant. On the way to the hospital, the petitioner continued to talk in a drunken, slurred manner, generally not making sense. During the ride the petitioner complained to the Coroner and his assistant that he was naked, although he was in fact fully clothed. At another point on the way to the hospital the appellant asked for his attorney. The Coroner asked him who his attorney was, and after several minutes, the Coroner and his assistant were able to comprehend the response, "Bill Jones". The Coroner put in a

radio call to the dispatcher requesting that Bill Jones meet the ambulance at the hospital, but after several minutes the dispatcher radioed back that Mr. Jones was out of town.

At about 1:30 p.m., upon arrival at the hospital, a blood sample was taken from the petitioner. The analysis showed a blood alcohol content of 374.3 miligrams percent, an extremely high level, affecting judgment, thought process, sensory functions, awareness and motor function. By statute, the State of Wyoming presumes a person is under the influence of intoxicating liquor to a degree that renders him incapable of safely operating a motor vehicle if there is an analysis of 150.0 percent or more.

The physician on duty at the time of petitioner's arrival at the hospital made a diagnosis of acute alcoholism and ordered petitioner hospitalized.

Petitioner was carried to a private room where he was placed in restraints, "for his own protection", and because he was a "prisoner". The restraints used were leather straps about two inches wide, which were placed on the petitioner's right arm and left leg. Petitioner, spread eagled in his hospital bed, was unable to move more than six inches in any direction. A "No Visitor" sign was placed on petitioner's door by hospital personnel.

Meanwhile, the Coroner returned to the petitioner's ranch where he discussed petitioner's request for his attorney with the County Attorney and his assistant who were participating in the investigation at the ranch house. Upon being told that the Coroner had attempted to contact Mr. Lonquest's attorney, the County Attorney became very upset and disturbed and wanted to know why the Coroner was calling Mr. Lonquest's attorney when the County Attorney hadn't even had a chance to question him.

Immediately, the County Attorney and his deputy left for the hospital to get a statement. They arrived at the hospital at 3:00 P.M., and went directly to the petitioner's room. Ignoring the "No Visitor" sign, the County Attorney entered the room without obtaining permission from any hospital personnel. No consideration was given to waiting for the petitioner's attorney because ". . . I didn't know whether you were in town or not,

and we were anxious to get on with the investigation".

The County Attorney explained the petitioner's rights and asked petitioner if he understood them. The petitioner responded in "the affirmative". Petitioner then "waived his rights". The petitioner seemed normal to those present during the interrogation, which included the County Attorney, Deputy County Attorney and a nurse's aid. The interrogation lasted thirty minutes during which time the County Attorney typed the confession in the first person narrative. During the entire process the petitioner remained strapped to his bed, immobile. With the aid of the County Attorney, petitioner signed the confession without reading it.

Twenty minutes after the County Attorney and his deputy left, the petitioner was given a huge dose of an antipsychotic tranqualizing drug called "Sparine", which is used only for serious psychotic disturbances, either extreme agitation or major psychosis.

Between 4:30 P.M., and 5:00 P.M., on July 10, 1970, the petitioner's attorney returned from Denver and was advised by his office that Mr. Lonquest was hospitalized and in need of assistance. Petitioner's attorneys went to the hospital but were unable to communicate with the petitioner and the petitioner was unable to communicate with them.

Petitioner was charged with first degree murder and entered pleas of not guilty and not guilty by reason of insanity. At the trial of the matter, after a hearing outside the presence of the jury, the trial judge admitted the confession into evidence over the objection of the petitioner's counsel that the introduction of such evidence violated petitioner's rights under the 5th, 6th and 14th Amendments to the United States Constitution.

After petitioner was charged with first degree murder he underwent an extensive series of psychiatric examinations. The opinions of the examining physicians called by the petitioner was that he was insane on July 10, 1970. The opinion of the non-board certified psychiatrist called by the prosecution was that plaintiff was sane on July 10, 1970. The State's witness admitted, however, that the plaintiff suffered a decrement in his intellectual capabilities on the afternoon of July 10th. He also

admitted that the extremely large amount of alcohol had an influence on petitioner's reasoning ability and that he might have been suggestible and irascible. The staff of the Wyoming State Hospital, which conducted an examination and evaluation of the Petitioner at the request of the trial court, reported to the court that, " . . . Mr. Lonquest's impairment of intellectual capability, coupled with the residual affects of alcohol taken in some proximity of the time of the alleged act would alter his ability to make reasoned judgments at that time."

The confession was admitted into evidence and Petitioner was found guilty of first degree murder and sentenced to life imprisonment at the Wyoming State Penitentiary. The Wyoming Supreme Court affirmed Petitioner's conviction holding, in part, that, "the trial judge first and the jury are the only possible available instruments" by which a determination of the Petitioner's ability to make a knowing and intelligent waiver can reasonably be made (See Appendix A, page 28).

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE SUPREME COURT OF WYOMING CONFLICTS WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE 4TH CIRCUIT.

The Supreme Court of Wyoming held the introduction of petitioner's confession into evidence did not violate his 5th, 6th, or 14th Amendment rights. At the time the confession was extracted, petitioner was hospitalized with a diagnosis by the attending physician of acute alcoholism. He was strapped to his bed and his movements were restrained throughout the interrogation process, "for his own protection." A blood alcohol test, taken shortly after petitioner was delivered by an ambulance to the hospital, was an extremely high 374.3 miligrams percent—nearing the level of death in some persons. Under these undisputed facts it was not, indeed could not be disputed, that petitioner was under the influence of alcohol at the time of the interrogation by the prosecuting attorney.

In holding that there was no constitutional error in admitting petitioner's confession into evidence under the above mentioned circumstances, the Supreme Court of Wyoming's decision is in conflict with a decision of the 4th Circuit Court of Appeals in the case of *Logner v. North Carolina*, 392 F.2d 222 (4th Cir. 1968). The 4th Circuit decision in that case affirmed and approved a decision by the United States District Court for the Middle District of North Carolina granting a petition for habeus corpus and vacating Logner's conviction. *Logner v. State*, 260 F. Supp. 970 (M.D.N.C. 1966). Logner's conviction had been upheld by the Supreme Court of North Carolina. *State v. Logner*, 145 S.E. 2d 867 (1966).

Simply stated, the question presented was the admissibility of Logner's confession which was given to officers while he was under the influence of intoxicating liquor and drugs. The United States District Court in a decision approved by the 4th Circuit, set aside the conviction and in doing so held, inter alia:

> "The essential fact that the petitioner was under the influence of alcohol and drugs to such an extent as to affect his judgment and that he was interrogated in that condition would render the statement involuntary."
>
> *Logner v. State*, 260 F. Supp. 970 at 975.

The conviction, said the court, offended due process.

The Wyoming Supreme Court in its decision approved and adopted the following "general rule taken from *People v. Schompert*, 19 N.Y.2d 300, 226 N.E. 2d 305, 308, 279 N.Y. Supp. 2d 515:

> "The general rule applicable to confessions obtained from persons under intoxication has been well stated to the effect that 'proof that the accused was intoxicated at the time he confessed his guilt of crime will not, without more, bar the reception of the confession in evidence. But if it is shown that the accused was intoxicated to the degree of mania, or of being unable to understand the meaning of his statements, then the confession is inadmissible."

That "general rule," as enunciated by the Wyoming Supreme Court is in conflict with the decision of the 4th Circuit Court of Appeals approving and affirming the United States District Court decision in *Logner v. State*, super.

This conflict justifies the grant of certiorari to review the judgment below.

2. THE DECISION OF THE SUPREME COURT OF WYOMING CONFLICTS IN PRINCIPLE WITH PREVIOUS DECISIONS OF THE UNITED STATES SUPREME COURT.

The decision of the Supreme Court of Wyoming conflicts in principle with a number of decisions of this Court. In *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed. 2d 1037 (1961), this Court stated:

> "No single litmus paper test for constitutionally impermissable interrogation has been evolved . . . The ultimate test remains . . . the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. *Rogers v. Richmond*, 365 US 534, 81 S.Ct. 735, 5 LEd 2d 760. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."

In *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L. Ed. 2d 770 (1963), Chief Justice Warren said:

> "If an individual's 'will was overborne' or if his confession was not the product of a rational intellect and a 'free will' his confession is inadmissible because coerced."

Was the confession in question a product of a rational intellect and a free will? Was the petitioner's capacity for self-determination critically impaired? The trial court found the confession was not coerced and its decision was upheld by the Supreme Court of Wyoming. The following undisputed facts mitigate against the correctness of that decision:

1. Confessor was mentally ill.
2. Confessor was an alcoholic hospitalized for acute alcoholism at the time of the interrogation.

3. Confessor was elderly, in poor physical condition, unable to read, and was not educated beyond the 3rd grade.
4. Confessor was strapped to his bed and thus unable to move or help himself in any way before, during and after the interrogation.
5. Confessor received a "huge" dose of antipsychotic tranqualizer twenty minutes after the prosecutor and his deputy left the hospital room.

It is submitted that psychological coercion in inherent in such a factual situation. It is further submitted that no confession extracted under such circumstances can be the result of unimpaired self-determination and it is, therefore, constitutionally impermissible under long standing and well recognized principles. *Townsend v. Sain*, supra; *Culombe v. Connecticut*, supra; *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L. Ed. 2d 242 (1960).

The trial court found that petitioner waived his right to remain silent and his right to have an attorney present at the time of the interrogation. This finding was upheld by the Wyoming Supreme Court. It is strongly urged that such a finding and disposition conflicts in principle, if not directly, with the decision of this Court in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602 (1966). In light of the undisputed facts above recited, it is contended that no waiver decision could be made knowingly and intelligently as required by the *Miranda* decision. The petitioner simply did not have the mental acuity and capacity to decide competently whether or not to waive his rights. At the risk of being all-inclusive, it is urged that no one hospitalized for acute alcoholism, with a blood alcohol content of 374.3 miligrams percent, could have the ability to make an intelligent waiver decision.

The finding of the trial court and decision of the Supreme Court of Wyoming conflicts in principle with the *Miranda* decision and with the decision of this court in *Escobedo v. Illinois*, 378 U.S. 478, 12 L.Ed. 2d 653, 84 S.Ct. 1489 (1964), in one other regard. On his way to the hospital, Mr. Lonquest attempted to exercise his constitutional right to have an at-

torney present. The Coroner attempted to comply with that request, but petitioner's attorney was out of town until 4:30 or 5:00 o'clock that afternoon. Petitioner's request was communicated to the County Attorney who became very disturbed and upset about it. Thereafter, no additional effort was made to comply with the petitioner's request. When the petitioner's attorneys arrived later in the afternoon, the confession had been extracted and the appellant had been knocked out with a large dose of antipsychotic tranqualizer. The *Miranda* decision specifically holds that the accused may withdraw his waiver of the privilege of silence at any time prior to or during the questioning if he indicates this intention "in any manner." The accused may also "state" that he wishes the assistance of counsel both before and during interrogation:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."

Miranda, 384 U.S. at page 474, 16 L.Ed. 2d at page 722, 723.

The Supreme Court, in *Escobedo v. Illinois*, supra, at page 487 quoted from *People v. Donovan*, 13 N.Y. 2d 148, 193 N.E. 2d 628:

> "It would be highly incongruous if our system of justice permitted the District Attorney, the lawyer representing the state, to extract a confession from the accused while his own lawyer seeking to speak with him, was kept from him by the police."

At that point, the Court footnoted Canon 9 of the American Bar Association's Canon of Professional Ethics:

> "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is encumbant upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel and he should not undertake to advise him as to the law."

The petitioner indicated his desire to have his attorney present. That request was communicated to the interrogating officer who, in response to a question as to why he did not wait until petitioner's attorney was present, testified:

". . . I didn't know whether you were in town or not, and we were anxious to get on with the investigation."

It is strongly urged that "getting on with the investigation" cannot take precedence over granting petitioner's request for his attorney to be present at the interrogation.

In *Haynes v. Washington*, 373 U.S. 503 10 L.Ed. 2d 513, 83 S.Ct. 1336 (1963), this court pointed out (at page 515) that the duty of constitutional adjudication requires that the question of whether the due process clause of the 14th Amendment has been violated by admission into evidence of a coerced confession be the subject of an independent examination of the record by the reviewing court. Thus, the fact that the trial judge and perhaps the jury came to a different conclusion in no way forecloses the duty of the reviewing court to examine the evidence and make its own determination as to whether the heavy burden which rests upon the State has been satisfied.

Although it quoted at length from the evidence, the Wyoming Supreme Court apparently did not feel constrained to make an independent determination of the possible existence of a due process violation. At two places in its decision, the Court below indicated it was not making such an independent determination. On page 11 of its decision (Appendix, page 27) the Wyoming Supreme Court stated:

> "An appellate court relying solely on the cold and written word is faced with a difficult if not impossible determination if it is asked to review such finding (of a knowing, voluntary and intelligent waiver) . . ."

Later, at page 12 of its decision (Appendix, Page 28) the Court reiterated:

> "The trial judge first and the jury are the only possible available instruments by which such determination [of a knowing, voluntary and intelligent waiver] can reasonbly be made . . ."

It is submitted that had the Supreme Court of Wyoming been armed with the presumption against waiver of fundamental rights, the task of reviewing the record at hand for due process violations, would have been considerably less difficult. As written by Justice Black in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1937):

"Courts indulge every reasonable presumption against

waiver of fundamental rights and that we 'do not presume acquiescence in the loss of fundamental rights' . . ."

The apparent failure of the Supreme Court of Wyoming to abide by the mandate of *Haynes v. Washington*, supra, requiring an independent determination of alleged due process violations, is a violation in principle with that decision and justifies the review of the judgment below.

3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS WITH RESPECT TO CONFESSIONS EXTRACTED WHILE THE CONFESSOR IS UNDER THE INFLUENCE OF DRUGS OR INTOXICATING LIQUOR.

The Supreme Court of Wyoming's opinion in this case reflects important Constitutional and policy considerations growing out of efforts by law enforcement officers to interrogate suspects and secure confessions from persons who are in some degree, under the influence of intoxicating liquor or drugs.

There are compelling reasons why some definitive guidelines in the application of due process principles to drug or alcohol induced confessions, and particularly those principles enumerated in the confession cases cited herein, should now be marked by this court. Drug abuse and alcohol abuse are grave problems of growing magnitude. Crimes associated in some way or another with such abuse are unfortunately, commonplace. Law enforcement officials, prosecutors, defense attorneys, and the judiciary urgently need the assistance of this court in understanding the permissible limits of interrogating those persons who are suspected of committing offenses and who are, at the time of the interrogation process, under the influence of intoxicating liquor or drugs. Should an intoxicated or drugged suspect be interrogated at all? Is it possible, within the requirements of the *Miranda* decision, for such a person to make a knowing, intelligent and voluntary waiver of his constitutional rights? Are additional evidentiary safeguards needed to insure that the fact finders have the tools available to make intelligent decisions as to the voluntariness of such confessions?

These are but some of the questions which it would be helpful to have answered.

CONCLUSION

It is perhaps paradoxical that, as the Sheriff testified, the petitioner was too intoxicated and too sick to be incarcerated in the Platte County jail on the afternoon of July 10th, but, as the judgment below indicates, he was capable of knowingly and intelligently waiving fundamental rights and giving a confession which put him in prison for the rest of his life.

The correctness of the decision below is open to serious question. The reluctance of the Wyoming Supreme Court to make an independent examination and finding of the voluntariness of the confession and the capability of the petitioner to make a voluntary, knowing and intelligent waiver of his rights cannot be justified. The decision below calls for the exercise of the Supreme Court's supervisory power. For the above and foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Wyoming.

Respectfully submitted,

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July 12, 1972

APPENDIX "A"

LONQUEST v. STATE
Cite as, Wyo., 495 P.2d 575

Harry L. LONQUEST, Appellant
(Defendant below),

v.

The STATE of Wyoming, Appellee
(Plaintiff below).

No. 4035

Supreme Court of Wyoming.
March 23, 1972

Defendant was convicted before the District Court, Laramie County, John F. Raper, J., of first-degree murder, and he appealed. The Supreme Court, Guthrie, J., held that evidence was sufficient to support finding that confession of defendant, who had previously volunteered that he had told his wife he would shoot her and that he did shoot her, who kept repeating that he had killed his wife and whose confession closely followed and coincided with other statements and physical facts as they appeared, was knowingly and voluntarily made, notwithstanding contention that his state of intoxication was such that he was unaware of his rights and unable to make intelligent waiver. The Court further held that refusal of proffered instruction summarizing involuntary hospitalization proceedings and setting out which proceedings would be instituted for hospitalization if defendant was acquitted on grounds of insanity was not error.

Affirmed.

1. Searches and Seizures (Key)3.3(4)

Where police officer went to defendant's ranch after being advised of telephone call by defendant to third person in which

defendant stated he thought he had shot his wife, entered back porch and knocked upon inner door upon arriving, called defendant's name but received no response and then entered kitchen after hearing moaning or mumbling and saw body of deceased wife whom he believed to be dead due to wound in back caused by shotgun, and where defendant after stating he had shot his wife asked for help and was helped by the officer into bedroom, no search was involved in discovery of items which were in officer's plain sight, and they could properly have been seized by such officer.

2. Criminal Law (Key)394.4(11), 1169(3)

Refusal to suppress admission of shotgun which was found behind open door to bedroom in house of defendant charged with shooting his wife and which was not in plain view until the door swung out was not error, where investigating officer's presence was in response to call by defendant to third person in which defendant stated he thought he had shot his wife and where defendant asked for help after such officer's entry and was helped by the officer into the bedroom; in addition, admission of the shotgun was harmless, where defendant based his defense to charge of first-degree murder on plea of insanity and accidental shooting.

3. Criminal Law (Key)526

Question whether a defendant's state of intoxication is such that he is unaware of his rights as to confession and unable to make an intelligent waiver must be determined on facts of each case as they arise.

4. Criminal Law (Key)412(4), 525

No confession or statement should be received unless maker was capable of realizing what he was saying and not suffering from delusions or hallucinations, so that he knowingly, understandingly and comprehendingly made the statement.

5. Criminal Law (Key)531(3)

Evidence was sufficient to support finding that confession of defendant, who had previously volunteered that he had told

his wife he would shoot her and that he did shoot her, who kept repeating that he had killed his wife and whose confession closely followed and coincided with other statements and physical facts as they appeared, was knowingly and voluntarily made, notwithstanding contention that his state of intoxication was such that he was unaware of his rights and unable to make an intelligent waiver.

6. Criminal Law (Key)517.2(2)

Where defendant was advised of his right to counsel and specifically waived such right prior to taking of his confession and in fact advised county attorney he wanted to make a statement, confession was not inadmissible on ground that defendant while on way to hospital asked for or advised coroner he wanted his attorney.

7. Criminal Law (Key)641.4(1)

Right to counsel is inalienable but cannot rise to the dignity that it cannot be waived.

8. Homicide (Key)163(1), 167(5), 169(6)

Admitting testimony as to various instances, within five years of defendant's killing of his wife, of personal violence toward wife and threats made by defendant to kill her was not abuse of discretion on ground such incidents tended to put defendant's character in issue and were too remote in time.

9. Homicide (Key)158(1), 159, 166(2)

Basis of admission of evidence as to instances of personal violence and threats by a defendant toward victim is that such evidence is relevant to show motive and malice.

10. Criminal Law (Key)384

Question of remoteness of evidence is directed to trial court's discretion, and ordinarily remoteness affects weight of evidence rather than admissibility.

11. Criminal Law (Key)789(1)

Giving of instructions defining and discussing reasonable

doubt was not error on ground it was contrary to law to attempt to define reasonable doubt.

12. Criminal Law (Key)1129(6)

Supreme Court was confined in its consideration of assignment of error, as to giving of instructions which defined and discussed reasonable doubt, to the express grounds stated unless there was fundamental error.

13. Homicide (Key)295(2)

In first-degree murder prosecution of husband for killing his wife, references in instructions to fits of passion and emotional insanity was not error on ground there was no evidence in record that crime could have been committed in fit of passion, where there was testimony of earlier fits of anger, violence, beatings and threats to kill directed against wife by defendant during their married life, and the reference to emotional insanity was mere explanation of the term "fits of passion."

14. Criminal Law (Key)773(1)

Refusal to give proffered instruction summarizing involuntary hospitalization proceedings and setting out which proceedings would be instituted for hospitalization if defendant was acquitted on grounds of insanity was not error, since function of jury to determine guilt or innocence upon evidence presented could not depend upon probable or proper disposal of defendant thereafter and since giving of such instruction would have injected irrelevant element into jury's deliberation and might have tended to confuse them and been invitation for jury to reach compromise verdict. W. S.1957, §7-242(b).

Raymond B. Hunkins, of Jones, Jones, Vines & Hunkins, Wheatland, for appellant.

Clarence A. Brimmer, Atty. Gen., and Richard A. Stacy, Asst. Atty. Gen., Cheyenne, for appellee.

Before McINTYRE, C. J., and PARKER, McEWAN and GUTHRIE, JJ.

Mr. Justice GUTHRIE delivered the opinion of the court.

This appeal is taken from a conviction for first degree murder arising from the shooting of appellant's wife in Platte County on July 10, 1970. The case was tried on a change of venue to Laramie County and a verdict of first degree murder without capital punishment was returned on May 3, 1971. Appellant relies upon four grounds for reversal, stated briefly as follows:

1. Error in receiving in evidence a shotgun and other articles along with pictures thereof taken by the sheriff from the ranch house of deceased and appellant.
2. Error in receiving an alleged confession of appellant.
3. Reception of prejudicial and irrelevant evidence as to prior conduct of appellant.
4. Error in giving of certain instructions and failure to give a certain proffered instruction.

The record is voluminous so no attempt will be made to make a full statement of the facts preliminarily. The facts applicable to and necessary for an understanding of these contentions and for our disposal thereof will be set out in discussing the separate contentions. To present the facts in chronological order, the question of the search and seizure will be first discussed. For convenience appellant will be referred to hereafter as defendant.

CLAIMED ILLEGAL SEARCH AND SEIZURE

At or near the hour of noon on July 10, 1970, Pauline Van Dyke received a telephone call at the LaRamie Hotel in Wheatland from defendant. He said, "I think Thelma is dead * * * I think I shot her." The sheriff was advised of this call and after getting investigative equipment went to the hotel to verify

the call and find out from whom it had come. He then proceeded to the Lonquest Ranch some 15 miles northeast of Wheatland. Upon his arrival he entered the back porch and knocked upon the inner door. He called, "Harry" but received no response. He heard certain moaning or mumbling. When he received no answer he entered the kitchen and saw the body of the deceased, whom he believed to be dead. The defendant was slumped against the door still leading to the living room. After the sheriff's entry defendant said, "I told her I would shoot her, she wouldn't listen to me so I shot her." Defendant asked for help and the sheriff helped him into the bedroom. There was a discharged shell lying on the kitchen table in plain sight. Upon his return to the kitchen he again saw the shotgun shell which was lying on the table in the middle of the kitchen. He observed from the kitchen the opened box of shotgun shells in an open cupboard in the bathroom, the bathroom door being open. There were some bloody clothes outside the bathtub in a pail and others in the bathtub. After defendant was taken to the hospital the sheriff examined the premises further and found a shotgun in the bedroom behind the door which was not in view when he took the defendant into the room because the door was propped open. The sheriff took pictures of these various exhibits and of the scene which were offered and received in evidence.

Defendant filed a motion to suppress this evidence which was heard on January 26, 1971. After hearing the testimony of the sheriff the motion was denied. Immediately prior to the taking of evidence, after objection to the mention of these seized items and pictures in any opening statement, the trial judge heard evidence concerning the seizure to a fuller extent and refused to suppress or withhold such evidence from the jury. The factual situation herein will be drawn from both hearings.

(1) The sheriff went to the ranch to investigate this occurrence because of the telephone call of Pauline Van Dyke. He had no knowledge of the condition of the defendant or what had transpired. Because he did not know the situation at the ranch he had called to have the coroner come out and had also called for an ambulance. When he saw Mrs. Lonquest's body he

could tell she was dead and the cause was a wound hole in the back; he was sure it was caused by a shotgun. He did not arrest the defendant. He had no idea whether this death had occurred because of a fight or was accidental. When he departed the sheriff took with him the shell, the box of shells, the shotgun, and the pictures which he had taken at the scene prior to the time defendant was taken to the hospital. The record indicates the discharged shell and box of shells and at least a part of the clothes were in plain sight of the investigating officer. His right to be present on the premises could not be seriously questioned, being as it was in response to a call by defendant. No search was involved in the discovery of these items and they could be seized by the officer. *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067; *Alcala v. State, Wyo.*, 487 P.2d 448, 453, certiorari denied 404 U.S.—, 92 S.Ct. 1259, 31 L.Ed.2d —.

(2) This leaves the question of the shotgun found behind the open door to the bedroom and not in plain view until the door swung out. Defendant places his reliance on the case of *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, rehearing denied 396 U.S. 869, 90 S.Ct. 36, 24 L.Ed.2d 124. The factual situation encountered therein and upon which that decision is based makes that case inapplicable to this matter. Chimel does recognize a reasonable search depends upon a totality of the facts and does not deny the right to make "reasonable" searches. It will be necessary to examine this matter upon its factual background.

The case of *State v. Chapman*, Me., 250 A.2d 203, is particularly applicable because of similarities in the factual situation. The officer in that case was answering a call to the home of defendant. He saw deceased in a chair. Defendant volunteered that deceased had fallen and hemorrhaged. A second officer arrived, looked around, and took some pictures. Defendant was then taken into custody and to the sheriff's office. No charges were filed at that time. After some cursory checking the house was left in charge of another officer. Upon their return the next day they made a complete and thorough search of the entire house and basement. One officer went into and searched three trash barrels in the garage, in one of which concealed under paper and trash he found a whiskey bottle

upon which was coagulated blood and hair and which was alleged to have been the murder weapon. Prior to its removal a picture was taken thereof. Objections were made and it was sought to suppress the picture and bottle. The court in that case upheld the search and seizure, noting the right of the officer to be on the premises where a homicide had occurred. The case suggests the importance of the search being "part of a continuing series of events which included the original arrest and continued uninterruptedly as lawful police investigation and action," 250 A.2d at 208. On the same page in Chapman an excerpt from the case of *Terry v. State of Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 1875, 20 L.Ed.2d 889, which epitomizes a philosophy applicable herein and of which we must not lose sight, is cited with approval as follows:

> "The exclusionary rule (excluding from evidence the fruits of unlawful searches and seizures) has its limitations, however, as a tool of judicial control. It cannot properly be invoked *to exclude the products of legitimate police investigative techniques* on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. * * *"

To ignore this would be to hamper and prevent proper investigation in this most serious of crimes with a detrimental effect to society as a whole and to the persons involved. The opinion mentions the two controlling facts for disposal of that matter to be the original lawful entry and that the police had never abandoned their possession or control of the premises. In upholding this search the court further cites the case of *Stevens v. State, Alaska*, 443 P.2d 600, certiorari denied 393 U.S. 1039, 89 S.Ct. 662, 21 L.Ed.2d 586, particularly with reference to the right to "process the scene." The following is then cited from the Stevens case with approval, 250 A.2d at 207:

> "* * * and upon learning that a homicide had been committed, it became Chief Knudson's *duty to conduct an investigation into the circumstances. This duty carried with it the right to inspect the premises.* * * *"

The case of *State v. Oakes, Vt.*, 276 A.2d 18, certiorari denied 404 U.S. 965, 92 S.Ct. 340, 30 L.Ed.2d 285, is very similar and was decided subsequent to Chimel. That court finds

no difficulty distinguishing the cases. In that case there was a telephone call from defendant asking for help and reciting, "She's here on the floor, dying." 276 A.2d at 21. Accused told the officers he had shot the woman. One of the officers went into an adjoining room where he saw an ironing board set up and upon which there was a 22-410 over-and-under rifle. The officers took this rifle along with some other articles with them when they removed defendant. Defendant moved to suppress and objected to the admission at the trial. The original entry was conceded to be lawful. The court said, 276 A.2d at 24:

> "* * * The officers were confronted with the body of Mrs. Oakes and circumstances making it their duty to conduct an investigation on the premises. This, of itself, justified the search and the taking into possession of the related instrumentalities there present. * * *"

Later in the opinion, 276 A.2d at 25, the court further observed:

> "It has already been noted that this investigation was taking place at the scene of the homicide. The role of the police officer carries with it the duty and responsibility to carry out such an investigation upon the discovery of what appears to be a crime. Once authorizedly on the scene, enforcement officers are under a duty to complete their investigation of the occurrence. Here, even if their original entry had been obstructed rather than solicited, the emergency situation called to their attention would have justified a warrantless entry and investigation of the scene as a part of their authorized duty, (Citing cases.)"

The Stevens case, supra, reiterates and discusses at some length not only the right but the duty of the officer to make such search and seizure in connection with an investigation of a homicide. We find in *Patrick v. State, Del.*, 227 A.2d 486, 489, as clear a statement of the rule governing such situations as we have encountered:

> "The general rules governing searches and seizures are subject to the exception of emergency situations, sometimes called the 'exigency rule.' The reasonableness of an entry by the police upon private property is measured by the circumstances then existing. The right of police to enter and investigate in an emergency, without an ac-

companying intent either to seize or arrest, is inherent in the very nature of their duties as peace officers, and derives from the common law. (Citing case.) The preservation of human life is paramount to the right of privacy protected by search and seizure laws and constitutional guaranties; it is an overriding justification for what otherwise may be an illegal entry. * * *"

In addition thereto, inasmuch as the defendandt based his defense on the plea of insanity and accidental shooting, the reception of this evidence if error was harmless as was expressed in the Oakes case, 276 A.2d at 25-26:

"Moreover, having in mind that the defense in this case was predicated, alternatively, on accident or mental irresponsibility, the matters evidencing the shooting and identifying the gun were issues not in controversy. The shooting episode was not denied. Therefore, even if some error can be discovered in connection with evidence offered in proof of these issues, it would be harmless beyond a reasonable doubt. (Citing case.)"

For these reasons the seizure of the shotgun herein was proper and the refusal of the court to suppress its admission as an exhibit was not error.

THE CONFESSION

The trial court, after a lengthy evidentiary hearing, admitted the statement or confession taken by Don Sherard, the county attorney, in the presence of Frank Jones, his deputy, and Betty Morris, a nurse's aid. The court found as a matter of law that the defendant gave this confession "voluntarily with full understanding of his rights, comprehension of the consequences of giving his statement," and that "Defendant did intelligently, and understandingly waive his right to have counsel present at the taking of the statement."

Defendant was brought to the Platte County Hospital at approximately 1:30 p.m. At the request of the coroner, Dr. Allison drew blood for a blood test, to which procedure defendant agreed. An analysis of this blood showed an ex-

tremely high blood alcohol content of 374.3 m.g. per cent. At approximately 3 p.m. Sherard, in company with his deputy Jones, entered the room of defendant and secured the presence of Betty Morris. Sherard advised defendant of his rights as set out in *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974, which the sheriff had also done at the ranch before defendant came to the hospital. These lay witnesses, Sherard and Morris, note that defendant gave lucid and responsive replies to questions, that he had no hallucinations or delusions, that he recognized people, and that he corrected and in some cases argued with Sherard about correct statements, particularly when he suggested to defendant that this killing had occurred on the spur of the moment and not as the result of a plan to kill deceased. The statement was read to him and he signed it.

There is a sharp conflict of testimony as presented by the experts, not an uncommon thing, as to the competence and understanding of defendant at the time the statement was given. Dr. Moore, a witness for the State, expressed the opinion that defendant knew and understood what he was doing at that time. There is the further testimony of the witnesses Morris and Sherard, as above mentioned. There is also other testimony in the record indicating responsiveness and understanding by the defendant of inquiries made to him. The court resolved this conflict in favor of the State applying the standard of proof beyond a reasonable doubt.

Defendant contends it was error to receive this confession because of the constitutional guarantees of the Constitution of the United States and of the State of Wyoming, contending that he was incapable of knowingly, intelligently, and voluntarily waiving his rights; that having requested an attorney, no questioning could be engaged until that attorney was in attendance; and that his will was overborne and the statement was not a product of his rational intellect.

It is not imporper to note that defendant volunteered to the sheriff when he came to the ranch that he had shot his wife—that he told her he would and he did—and that he kept repeating over and over to Morris and even repeated when not directed to anyone that he had killed his wife. This may have

been the result of compulsions but ones that originated within this defendant and not from any outside source. It may also be considered of some significance in determining the condition of the defendant as to his understanding that the confession closely followed and coincided with the other statements and physical facts as they appeared.

The recent case of *Lego v. Twomey*, 404 U.S. —, 92 S.Ct. 619, 30 L.Ed.2d 618, is of help in a consideration of this matter, particularly insofar as defendant asserts a violation of his federal constitutional rights. That case held it was the duty of the trial judge to determine the admissibility of the confession and that it was not constitutionally impermissible to use the standard of preponderance of the evidence to determine the same even though the question of voluntariness was not thereafter to be submitted to the jury. This latter of course was done in the case at hand by instruction, giving to the jury the standard of proof beyond a reasonable doubt and instructing them to reject it unless they found the same voluntary. Thus in this case we have two separate finders of fact considering the question of the voluntariness of this confession under the highest standard of required proof.

The discussion in Lego further emphasizes that the voluntariness hearing is not to enhance or determine reliability of the confession but only to determine if it had been given voluntarily. In presenting the matter of the admissibility of this confession defendant refers to the testimony of Dr. Montague, who treated defendant several weeks before the fatal incident. He cast doubt upon the reliability of the confession and the competency of defendant at that time. This evidence was not presented at the hearing on admissibility so that it was not properly considered in the disposal of this specific question. It was directed to the jury and undoubtedly considered by them under the instructions of the court both as to this confession and as to insanity.

The most troublesome aspect of this matter is a determination of the effect of the high alcoholic blood content and defendant's admitted acute alcoholism upon his grasp of reality so that the voluntariness may be determined. The record does reflect some testimony as to a static rate at which alcohol is

eliminated from the system, the figure being given at 20 m.g.'s per hour. If this be correct the blood alcohol content was at least some 30 m.g.'s less at the time of taking the statement. The other experts note different rates of elimination, variant because of individual conditions. There is considerable testimony affecting tolerance or "adoption capability" in individuals of heavy drinking habits, indicating one man accustomed to consuming large quantities of alcohol may be much less affected in his normal functions as contrasted to one unaccustomed to the use of alcohol or even a moderate user. The experts, though admitting this in principle, could not give any definite answers as to the limits or proper application thereof. It is apparently still in the study stage. It is a fact the degrees of intoxication and its effect on the competency or processes of an individual can only be determined from individual to individual and upon the surrounding facts.

It is difficult for a trial court to determine the competency and understanding of such a person but it can and did in this case rely upon the testimony and factual situation recited by the witnesses to defendant's actions, condition, and conduct. An appellate court relying solely on the cold and written word is faced with a difficult if not impossible determination if it is asked to review such finding. See *Moss v. State, Wyo.*, 492 P.2d 1329, 1333.

These circumstances make particularly applicable the statement by the court in *State v. Collins*, 253 Or. 74, 453 P.2d 169, 170, where the defendant claimed that when he made certain statements he was drunk or "hung over" and did not understand or waive his rights, as follows:

> "We have held that whether or not an accused understood the warnings is a matter of historical fact and if there is any evidence to support the trial court's finding that the accused did understand, the finding will stand. * * *" 1.

It is to be further noted that not one but two finders of fact, i.e., the trial judge at the evidentiary hearing out of the presence

1. See *State v. Sanders*, 101 Ariz. 410, 420 P.2d 281, 283-284; *State v. Hansen*, 199 Kan. 17, 427 P.2d 627, 630; and *State v. Smith*, 80 N.M. 126, 452 P.2d 195, 198.

of the jury, and the jury under proper instructions after having heard the evidence, have both made factual determination as to the voluntariness of the confession. From all that appears the jury could have disregarded this confession and could still have arrived at the verdict. Courts may be too inclined to assume that jurors in their traditional role as factfinders ignore this duty enjoined by the instructions. This court has heretofore held that there is a presumption a jury follows the instructions, *Dobbins v. State, Wyo.*, 483 P.2d 255, 259.

(3, 4) There could be no serious question of the factual basis for the court's finding or the determination by the jury of the voluntary character of the confession in the absence of the high blood alcohol content of the defendant. The question is whether the defendant's state of intoxication was such that he was unaware of his rights and unable to make an intelligent waiver. There is testimony by the State's experts as well as the lay witnesses upon this question. It would be an unworkable and unfair rule if an accused could in all cases as a matter of right insulate himself from the consequences of any statement voluntarily and understandingly made by the prior voluntary taking of an amount of alcohol. Necessarily this question must be determined on the facts of each case as they arise. No confession or statement should be received unless the maker was capable of realizing what he was saying and not suffering from delusions or hallucinations, so that he knowingly, understandingly and comprehendingly made the statement. The trial judge first and the jury are the only possible available instruments by which such determination can reasonably be made. Defendant does not contend that the general rule as to the reception of confessions from intoxicated persons is other than as set out in *People v. Schompert*, 19 N.Y.2d 300, 279 N.Y.S.2d 515, 519, 226 N.E.2d 305, 308:

> "The general rule applicable to confessions obtained from persons under intoxication has been well stated to the effect that 'proof that the accused was intoxicated at the time he confessed his guilt of crime will not, without more, bar the reception of the confession in evidence. But if it is shown that the accused was intoxicated to the degree of

mania, or of being unable to understand the meaning of his statements, then the confession is inadmissible.' * * *" 2

Defendant's contetion being based upon the facts in this case and apparently under the "mania" exception noted in *People v. Schompert*, supra, and other cited cases, it is interesting to note the discussion defining "mania" in *People v. Schompert*, 19 N.Y.2d 300, 279 N.Y.S.2d at 518, 226 N.E.2d at 308, as follows:

"Lack of awareness or understanding alone might be sufficient to exclude a confession in the rare case where it clearly appears that at the time of the confession the confessant was so intoxicated as to lack mental capacity, that is, he was unable to appreciate the nature and consequences of his statements. This, no doubt, is the 'mania' referred to in the older cases."

This court in *Kennedy v. State, Wyo.*, 422 P.2d 88, 90-91, recognized this was a factual determination to be made from the evidence.

(5) It is our opinion there was sufficient evidence upon which the trial judge could base his finding that the confession was knowingly and voluntarily made. Defendant has made a great part of his argument based on the case of *Miranda v. State of Arizona*, supra. Notably the warnings given defendant are the Miranda warnings. The Miranda case only sets out certain elements necessarily satisfied in determining the admissibility of a confession. Particularly when taken in connection with the Lego case it cannot be said to have set out the necessary quantum of proof.

2. See *People v. Byrd*, 42 Cal.2d 200, 266 P.2d 505, 511, certiorari denied 348 U.S. 848, 75 S.Ct. 73, 99 L.Ed. 668; *Mergner v. United States*, 79 U.S.App. D.C. 373, 147 F.2d 572, certiorari denied 325 U.S. 850, 65 S.Ct. 1085, 89 L.Ed. 1971; 3 *Wigmore on Evidence*, § 841, p. 489, et seq. (Chadbourn Rev. 1970); 2 *Wharton's criminal evidence*, §388, p. 122 (12th Ed.). Other cases have held without further comment that intoxication merely goes to the weight, *State v. Isom*, 243 N.C. 164, 90 S.E.2d 237, 238, 69 A.L.R. 2d 358, and cases collected in Annotation 69 A.L.R.2d 361, 364, §3, et seq.

(6, 7) Defendant further strongly contends that because he asked for or advised the coroner he wanted his attorney, Bill Jones, while on the way to the hospital that all further interrogation should have ceased until his attorney was present. The record is confusing as to whether the county attorney knew and heard of this request prior to the time he took this statement. However, the record shows without dispute that prior to taking the statement defendant was advised of his right to counsel and specifically waived it. As a matter of fact, defendant advised the county attorney he wanted to make a statement. The right to counsel is inalienable but this right cannot rise to the dignity that it cannot be waived. [3] Defendant also suggests the inadmissibility of the confession under this state of facts by virture of Canon 9, American Bar Association Canons of Professional Ethics. We find this worthy of no discussion except by reference to *State v. Nicholson*, 77 Wash.2d 415, 463 P.2d 633, 636-637.

PREJUDICIAL EVIDENCE OF PRIOR CONDUCT

(8) The State called a series of four witnesses who testified as to various instances of personal violence toward the deceased and threats made by the defendant to kill her. The trial court limited evidence of this character to events which occurred in 1965 or thereafter and excluded earlier evidence on the ground of remoteness. Defendant contends that these incidents tended to put his character in issue and were too remote in time.

(9, 10) The admissibility of this type of evidence in a case of this character has been recognized in *Alcala v. State, Wyo.*, 487 P.2d 448, 455, certiorari denied 404 U.S. —, 92 S.Ct. 1259, 31 L.Ed.2d —. The basis of the admission of such evidence is that it is relevant to show motive and malice. This court has

3. *Dillon v. United States*, 10 Cir., 391 F.2d 433, 437, certiorari denied 393 U.S. 889, 89 S.Ct. 208, 21 L.Ed.2d 168; *State v. Adams*, 76 Wash.2d 650, 458 P.2d 558, 572, reversed as to death sentence 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855; *Reid v. State*, Okl.Crim., 478 P.2d 988, 999.

heretofore announced its adherence to the prevalent rule that the question of remoteness is directed to the trial court's discretion and that ordinarily remoteness affects the weight of the evidence rather than the admissibility. The discussion of Chief Justice Blume in *State v. Koch*, 64 Wyo. 175, 189 P.2d 162, 164, sets out this view. The case of *State v. Grider*, 74 Wyo. 88, 284 P.2d 400, 406, rehearing denied 74 Wyo. 111, 288 P.2d 766, repeats recognition of the principle that the question of remoteness rests in the discretion of the trial court.

INSTRUCTIONS

(11, 12) Defendant asserts error resultant from giving Instructions 4, 6, and 7, which define and discuss reasonable doubt. The objections asserted thereto were that they attempted to define "reasonable doubt" and this is "contrary to law," and as further grounds asserted that the giving of separate instructions raised a special emphasis thereon and that the instructions defined what reasonable doubt is not rather than what it is. We are confined in our consideration of this assignment of error to the express grounds stated unless there is fundamental error. The test of an objection which rasies a question for consideration is set out in *Alcala v. State*, supra; *Drummer v. State, Wyo.*, 366 P.2d 20, 23-24, and *State v. Chambers*, 70 Wyo. 283, 249 P.2d 158, 162. The first objection has been decided adversely to the defendant, having been held it was not error to so instruct, *Alcala v. State*, supra; *Carrillo v. State, Wyo.*, 474 P.2d 123, certiorari denied 401 U.S. 921, 91 S.Ct. 907, 27 L.Ed.2d 823. It is true this court has held it is not error not to so instruct, *State v. Goettina*, 61 Wyo. 420, 158 P.2d 865, 882; *State v. Velsir*, 61 Wyo. 476, 159 P.2d 371, 378, 161 A.L.R. 220. This court in Alcala comments thereon, 487 P.2d at 460, and repeats the comments in more definite form in *Lofton v. State, Wyo.*, 489 P.2d 1169, 1174. The other ground of claimed error that results from special emphasis and the negative statement of the term is not pursued in the brief or argument and no demonstrated prejudicial effect is attempted. It is difficult to conceive that these instructions were prejudicial in light of the overwhelming proof of guilt adduced by the State.

(13) Defendant further asserts the trial court erred in including in Instruction 16 a reference to "fits of passion," contending there was no evidence thereof, and purporting to instruct the jury concerning emotional insanity. This claim was based upon the assertion there is no evidence in the record that this crime could have been committed in a fit of passion. This simply is not consonant with the record. There is testimony of the earlier fits of anger, violence, threats to kill, and beatings directed against the deceased by the defendant during their married life. The reference to emotional insanity is a mere explanation of the term "fits of passion." All this portion of the instruction given to which objection was made comes directly from *Flanders v. State*, 24 Wyo. 81, 156 P. 39, 42, rehearing denied 24 Wyo. 81, 156 P. 1121.

(14) Defendant further claims it was error to refuse an instruction which summarized involuntary hospitalization proceedings, §7-242(b), W.S.1957, setting out what proceedings would be instituted for hospitalization if the defendant were acquitted on grounds insanity. It would be improper to give such an instruction.

The function of the jury in this case or any criminal case is to determine the guilt or innocence of a defendant upon the evidence presented. This cannot depend upon probable or proper disposal of the defendant thereafter. *Nicholson v. State*, 18 Wyo. 298, 106 P. 929, 931; *State v. Park*, 159 Me. 328, 193 A.2d 1, 5. The giving of such instruction injects a totally irrelevant element into the jury's deliberations separate and apart from the function they serve and may tend to confuse them, *Pope v. United States*, 5 Cir., 298 F.2d 507, 508. The suggested instruction may be an invitation for the jury to reach a compromise verdict, *People v. Adams*, 26 N.Y.2d 129, 309 N.Y.S.2d 145, 257 N.E.2d 610, 614, certiorari denied 399 U.S. 931, 90 S.Ct. 2262, 26 L.Ed.2d 800. There are few jurisdictions which hold that such instruction should be given. [4]

4. The Adams case above contains an excellent discussion of this division of authority showing a very small minority of states which hold the instruction proper. *State v. Hood*, 123 Vt. 273, 187 A.2d 499, 500-501, 11 A.L.R.3d 732, and Annotation 11 A.L.R.3d 737, et seq., are also instructive.

It might be further suggested that the legislature by its enactment of §7-242(b) delegated the duty of the determination of this question to a separate forum before a commission or jury who should determine this issue. Because of the legislature's action assigning this determination to another body at another time, it would be improper to inject this issue into the trial of the principal case.

Affirmed.

APPENDIX "B"
IN THE SUPREME COURT
OF THE STATE OF WYOMING
No. 4035

HARRY L. LONQUEST,)
)
Appellant)
(Defendant below),)
)
vs.)
)
STATE OF WYOMING)
)
Appellee)
(Plaintiff below.))

APPLICATION FOR REHEARING

Pursuant to Rule 14, of the Wyoming Supreme Court Rules, Harry L. Lonquest, acting through his attorneys, Jones, Jones & Hunkins, respectfully submits this Application for Rehearing in the above captioned case decided on March 23, 1972. This application is filed with all due respect to the Court and not for the purpose of being argumentative. It is submitted because the petitioner believes that the Court has arrived at an erroneous conclusion, and therefore respectfully requests the Court for permission to be heard on this matter.

Following is a brief statement of the points wherein the petitioner alleges the Court has erred:

1. In finding there was sufficient evidence to support the admission of the alleged confession into evidence in view of the following:

(a) In failing to consider that during the entire interrogation process which took place in the Defendant's hospital room, he was spread-eagled in his hospital bed by the use of leather restraints on his ankle and wrist, was strapped thereto and was thus rendered incapable

of exercising any of his constitutional rights, there being no showing that the persons present during the interrogation process offered to release him from the restraints so that he could once again attempt to exercise his right to have his attorney present, especially in view of the fact that he had previously requested that his attorney be contacted.

(b) In failing to consider the testimony of the Defendant at the confession hearing to the effect that he could not remember what transpired on the afternoon in question, particularly in view of the obvious confusion which he displayed at the confession hearing concerning the sequence of events that occurred in the hospital and particularly the days on which he was visited by his attorneys.

(c) In failing to consider the staff report of the State Hospital which is a part of the record on appeal, and which was available to the trial judge at the time of the confession hearing to the effect:

> We are also of the opinion that Mr. Lonquest's impairment of intellectual capability, coupled with the residual affects of alcohol taken in some proximity of the time of the alleged act would alter his ability to make reasoned judgments at that time.

Further, in relying upon the opinion of the State's "expert" who was not a Board certified psychiatrist at the time he testified as to his opinion concerning the "voluntariness" of the alleged confession and by not giving consideration to the opinion of Dr. R. Robert Cohen, a Board certified psychiatrist who did testify at the confession hearing to the effect that the Defendant could not make reasoned judgments at the time the confessions was extracted.

(d) In subscribing to the opinion of the State's expert that the confession was voluntary, but in failing to subscribe to the State Expert's opinion that the Defendant, at the time the confession was extracted, was mentally ill and

was suffering from a decrement in his intellectual capability and reasoning ability on the afternoon of July 10th, all of which goes to the issue of whether or not the Defendant was capable of knowingly, intelligently and understandingly waiving his rights rather than to the issue of "voluntariness."

(e) In concluding that, "the record is confusing as to whether the County Attorney knew and heard of (Defendant's request for an attorney on his way to the hospital) prior to the time he took the statement," when the record is clear that the County Attorney was specifically informed of the Defendant's request prior to the time he went to the hospital for the purpose of extracting the confession; particularly in view of the Defendant's complete physical inability to remove himself from the restraints so as to be able to accomplish the rights which were allegedly explained to him, assuming he had the intellectual ability to understand the meaning and significance of the explanation.

(f) In holding that the trial judge and the jury are the only possible available instruments by which a determination of the defendant's ability to make a knowing and intelligent waiver can reasonably be made, in view of the United States Supreme Court's decision in the case of *Haynes v. Washington*, 373 US 503 (1963).

(g) In failing to consider that the Defendant was given a huge dose of an antipsychotic tranqualizing drug, given only for extreme agitation, within twenty (20) minutes after the confession had been extracted.

(h) By failing to consider the testimony of the State's witness, Sheriff Einer Mickelson, to the effect that the Defendant was in "bad shape," and too sick and intoxicated to be taken to jail and by failing to apply this testimony to the issue of the voluntariness of the confession and the ability of Defendant to knowingly, understandingly, and intelligently waive his constitutional rights.

(i) For the above and foregoing reasons in failing to reverse this case because of the violation of Defendant's 5th, 6th and 14th Amendment rights guaranteed under the United States Constitution.

2. In holding that the admission of the shotgun into evidence was not prejudicial error to the Defendant as being in violation of his federal Constitutional rights under the 4th and 14th Amendments to the United States Constitution where the "exigency" of the situation, if it had existed, had been removed at the time of Defendant's removal from the premises, the scene having been processed and no further search or seizure being justified and no reason being apparent why a warrant could not have been issued prior to the time of the seizure of the items subsequently introduced into evidence at the trial of this matter.

In summary, the petitioner believes that a careful review of the evidence, particularly those matters which are uncontradicted, will lead the Court to the conclusion that the confession introduced by the State, was extracted from the Defendant unlawfully and in violation of his Constitutional rights as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution, and that the seizure of the shotgun was accomplished in violation of the Defendant's Constitutional rights under the 4th and 14th Amendments of the United States Constitution; that the subsequent introduction of the confession into evidence was a violation of due process of law in that Defendant's right to counsel and rights against self-incrimination were denied, and that the introduction of the shotgun into evidence was also a denial of due process of law because the search and seizure was unreasonable and therefore the items should have been suppressed.

Petitioner, Harry L. Lonquest, prays the Court grant a rehearing in this case.

Respectfully submitted,
JONES, JONES & HUNKINS
/s/ RAYMOND B. HUNKINS
Raymond B. Hunkins
P. O. Drawer 531
Wheatland, Wyoming 82201

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the above APPLICATION FOR REHEARING to Clarence A. Brimmer, Attorney General, State of Wyoming, 210 Capitol Building, Cheyenne, Wyoming 82001, with proper United States postage thereon this 24th day of April, 1972.

/s/ Raymond B. Hunkins

APPENDIX "C"

**IN THE SUPREME COURT,
STATE OF WYOMING
APRIL TERM, A.D. 1972**

HARRY L. LONQUEST, Appellant (Defendant below),	)	
v.	)	No. 4035
THE STATE OF WYOMING, Appellee (Plaintiff below).	)	In the Supreme Court State of Wyoming FILED May 9, 1972 /s/ Ann Oeland Clerk

ORDER

Petition for rehearing having been filed herein by this appellant and it appearing that the evidence reasserted and reargued by appellant by his motion was carefully and fully considered in the disposal hereof and it further appearing that the points raised were carefully and fully considered by the court in the disposition heretofore made,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

Dated at Cheyenne, Wyoming, this 8th day of May, 1972.

BY THE COURT:
/s/John J. McIntyre
JOHN J. McINTYRE, Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on this 26th day of July, 1972, three copies of the Petition for Writ of Certorari were mailed, postage prepaid, to Clarence A. Brimmer, Attorney General, State of Wyoming, 210 Capital Building, Cheyenne, Wyoming 82001, with proper United States postage thereon.

Raymond B. Hunkins
Jones, Jones & Hunkins
P. O. Drawer 531
Wheatland, Wyoming 82201
Counsel for Petitioner